No. 17-801

In the Supreme Court of the United States

IN RE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE PETITIONERS

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Respondents challenge the former Acting Secretary's decision to wind down the policy of immigration enforcement discretion known as DACA. That decision is not judicially reviewable. But even if it were, under settled principles of judicial review of agency action, the decision would be reviewed based on the Acting Secretary's stated reasons and on the record presented, not on pre-decisional documents containing the agency's internal deliberations about that record.

Respondents have not even attempted to make the showing required to warrant departure from those principles. Cf. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971). Indeed, after months of litigation, neither the district court nor respondents have ever explained why, to review the discretionary enforcement policy at issue, it is necessary to conduct discovery or add to the administrative record vast amounts of deliberative and other materials on which the Acting Secretary's statement of enforcement policy did not rely and that are immaterial to her decision.

1. The district court clearly erred by mandating sweeping additions to the administrative record and by authorizing intrusive discovery. See Pet. 18-32. It is well settled that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam). And it is "not the function of the court to probe the mental processes" of agency decisionmakers. *Morgan* v. *United States*, 304 U.S. 1, 18 (1938). Rather, the court's review is to be based on the reasons "articulated by the agency itself," and the agency's action "must be upheld, if at all, on th[at] basis." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

It is particularly inappropriate to go beyond the existing record in this case. Respondents challenge not a regulation or an adjudication, but a discretionary statement of policy concerning DHS's enforcement of immigration laws. No statutory provision required any particular procedure, public input, or predicate findings, or directed the Acting Secretary to consider any particular factors, in issuing that policy statement. And her decision rested not on empirical judgments requiring evidence, but instead on the policy and legal concerns set forth in the Rescission Memo itself.

Such a determination of general enforcement policy, like other enforcement decisions, is committed to agency discretion by law and thus not reviewable at all. See 5 U.S.C. 701(a)(2); *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). That is particularly true in the immigration context, where the "broad discretion exercised by immigration officials" is a "principal feature of the removal system." *Arizona* v. *United States*, 567 U.S. 387, 396-

397 (2012). Nothing in the Immigration and Nationality Act cabins that discretion here. To the contrary, 8 U.S.C. 1252(g) *precludes* jurisdiction to review challenges to "'deferred action' decisions and similar discretionary determinations * * * outside the streamlined process that Congress has designed" for litigating an alien's removal. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999) (*AADC*); see *id.* at 485 & n.9; see also 8 U.S.C. 1252(b)(9).

The Acting Secretary's decision is therefore not judicially reviewable at all. But even if it were, it requires no additional materials to evaluate. Respondents' arguments to the contrary lack merit.

a. Respondents principally defend (*e.g.*, Indiv. Br. in Opp. 14) the district court's orders on the ground that the APA contemplates review upon "the whole record." 5 U.S.C. 706; cf. *Overton Park*, 401 U.S. at 420 (review "is to be based on the full administrative record"). But the "whole record" mandate is a directive to *courts*, not agencies. Prior to the APA's enactment, courts performing "substantial evidence" review sometimes upheld agency action as long as any favorable evidence appeared in the record. In specifying that "the court shall review the whole record," 5 U.S.C. 706, Congress overturned that practice, so that now "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight," *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487-488 (1951); see *ibid.* ("This is clearly the significance of the [APA's] requirement * * * that courts consider the whole record."). The "whole record" provision thus does not speak to what materials that an agency must include in the record in the first place—especially here, where the enforcement policy did not require an evidentiary assessment and is

not subject to substantial-evidence review. See *Overton Park*, 401 U.S. at 415.

Respondents protest (*e.g.*, States Br. in Opp. 14-15) that some lower courts have stated that the administrative record must include all materials that were "directly or indirectly considered" by agency decisionmakers. Cf. No. 17A570, slip op. 4 (Breyer, J., dissenting) (Dissent). To the extent respondents understand that articulation to encompass every "email[], letter[], memo[], note[], media item[], opinion[] [or] other material[]" that passed, "however briefly," before the eyes of the Acting Secretary (Pet. App. 42a), it cannot be the law. Just as a court, or an agency conducting a formal hearing, may exclude material as irrelevant, lacking a sufficient foundation, or otherwise inadmissible, an agency can similarly confine the record on which to base informal agency action. Nothing in the APA suggests that an agency compiling a record for informal agency action must include every piece of paper that might touch on the subject, and this Court has made clear that courts are not authorized to add to the APA's requirements. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978). The administrative record in every APA case need not include, for example, every newspaper article read by the decisionmaker. Cf. Indiv. Br. in Opp. 16. Such materials are not "considered" in the relevant sense.[1]

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[1] Respondents also note (Indiv. Br. in Opp. 16) that the record does not include an unsolicited letter supporting DACA from 20 States (including certain respondents) purportedly sent to the President, copying former DHS Secretary John Kelly. But they fail to show that that letter was considered by the Acting Secretary (or her subordinates) in making her decision.

It is the agency's responsibility to develop the record on which its decision will be based, and then, if its decision is challenged, to compile that record and submit it to the court. See *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). Of course, an agency cannot act arbitrarily in so doing. When an agency's decision turns on a factual assessment, for example, the agency may not selectively include evidentiary material that supports its findings while excluding relevant, adverse material. A strong showing of such "bad faith or improper behavior" would permit a district court to look beyond the agency-compiled record. *Overton Park*, 401 U.S. at 420. But respondents have not even attempted to make such a bad-faith showing.

Respondents' concerns that applying these settled principles will "pose[] a serious threat" (Regents Br. in Opp. 16) to judicial review of agency action are misplaced. See Dissent 3-4. There is no need to add to the record to determine whether the Acting Secretary "overlooked relevant factors" or "considered irrelevant [ones]." Regents Br. in Opp. 16. She identified the bases for her decision in the Rescission Memo, to which any judicial review must be directed. See *State Farm*, 463 U.S. at 43; *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). No expansion of the record or discovery is needed, or would even be helpful, to determine whether those bases were sufficient to survive deferential arbitrary-and-capricious review.

Nor could expansion of the record possibly be required to determine whether the Acting Secretary's explanation for her decision "r[an] counter to the evidence before [the agency]." States Br. in Opp. 13 (citation omitted). She did not rely on an evidentiary record for

her assessment of the legal and policy issues at stake.[2] And it makes no difference if the Acting Secretary's assessment differed from those of her subordinates. Cf. Indiv. Br. in Opp. 27. The lawfulness of her action is a question that, if reviewable at all, should be determined "objectively" by evaluating the reasons she gave, Dissent 4, not by a show of hands from agency personnel.

Even if the current administrative record were insufficient, that would not "make judicial review toothless." Indiv. Br. in Opp. 15. Rather, if the reviewing court "cannot evaluate the challenged agency action on the basis of the record before it," the action is set aside and the matter is "remand[ed] to the agency for additional investigation or explanation." *Florida Power*, 470 U.S. at 744.

Respondents again rely (*e.g.*, Indiv. Br. in Opp. 14-15) on informal guidance circulated by DOJ's Environment and Natural Resources Division to certain client agencies on compiling an administrative record. But as the government has explained (Pet. 24-25), that non-binding guidance says nothing about what a *court* may order an agency to produce. And because an agency bears the risk of producing an insufficient record, see Pet. App. 17a-18a (Watford, J., dissenting), the agency may reasonably choose to include more than the law requires.

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[2] Although respondents note (Regents Br. in Opp. 17) that the Attorney General suggested in a press statement that rescinding DACA would "reverse the loss of hundreds of thousands of jobs to illegal aliens and reduce crime, violence, and terrorism," the Acting Secretary did not base her decision on any such factual judgments, as respondents acknowledge (*ibid.*). See *Sierra Club* v. *Costle*, 657 F.2d 298, 407-408 (D.C. Cir. 1981) (upholding agency's exclusion of materials upon which agency "ma[de] no effort to base [its] rule").

Respondents offer no persuasive defense of the district court's orders requiring all White House officials who consulted with the Acting Secretary about DACA, including the President or Vice President, to "scour" their files for "documents for inclusion in the administrative record." Pet. App. 43a. Respondents instead complain (*e.g.*, States Br. in Opp. 25-26) that the government has not explained in sufficient detail why that requirement is burdensome. But this Court in *Cheney* v. *United States District Court*, 542 U.S. 367 (2004), concluded that the propriety of similarly broad document demands could be evaluated based simply on the face of plaintiffs' requests, and specifically held that the White House was not required to "bear the onus of critiquing th[ose] unacceptable discovery requests line by line" before the government's objections were addressed. *Id.* at 388. The district court's orders here requiring White House officials to search for and review "responsive" documents impose substantially the same burden.

Respondents claim (States Br. in Opp. 29) they are entitled to discovery on their "non-APA claims," but as explained (Pet. 23), constitutional challenges to agency action are governed by the APA just like any other challenge. See 5 U.S.C. 706(2)(B) (authorizing judicial review of agency action allegedly "contrary to constitutional right, power, privilege, or immunity"). And, in any event, respondents have not remotely satisfied the "rigorous standard" for seeking discovery in aid of their discriminatory-enforcement claims. *United States* v. *Armstrong*, 517 U.S. 456, 468 (1996); *AADC*, 525 U.S. at 489-491.

b. Respondents wrongly defend the ordered inclusion of deliberative materials by attempting to distinguish (*e.g.*, Regents Br. in Opp. 18) between depositions

probing the decisionmaking process and the compelled production of documents memorializing agency deliberations.[3] As the D.C. Circuit has repeatedly recognized, however, the compelled disclosure of deliberative materials is no less intrusive. See Pet. 27-28 & n.6; *San Luis Obispo Mothers for Peace* v. *United States Nuclear Regulatory Comm'n*, 789 F.2d 26, 28, 44-45 (en banc) (plurality opinion), cert. denied, 479 U.S. 923 (1986); *Checkosky* v. *SEC*, 23 F.3d 452, 489 (1994) (opinion of Randolph, J.); *Norris & Hirshberg, Inc.* v. *SEC*, 163 F.2d 689, 693 (1947) ("[I]nternal memoranda made during the decisional process * * * are never included in a record."), cert. denied, 333 U.S. 867 (1948).

Respondents urge this Court to ignore these decisions because they were articulated in the context of formal adjudications (*Morgan*) or multi-member agencies (*San Luis Obispo*). *E.g.*, States Br. in Opp. 19, 22-23; cf. Dissent 5-6. But an agency's need for internal, nonpublic deliberation is no less compelling in informal decisionmaking or for single-headed agencies. Indeed, this Court has described the "importance of * * * confidentiality" for "communications between high Government officials and those who advise and assist them" as "too plain to require further discussion." *United States* v. *Nixon*, 418 U.S. 683, 705 (1974); see, *e.g.*, *National Sec. Archive* v. *CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014) ("[I]f agencies were to operate in a fishbowl, the frank

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[3] Justice Breyer suggested that, "[a]t least facially," the categories of documents implicated by the district court's orders "do not seem to involve 'inquiry into the mental processes' of the decisionmaker at all." Dissent 5. But neither the district court nor respondents have offered any reason for gathering every internal "email[]," "memo[]," and "opinion[]" *except* to inquire into the content of the agency's internal deliberations.

exchange of ideas and opinions would cease.") (citation omitted). And the same interests are at stake whether the agency's deliberations are reflected in contemporaneous documents or after-the-fact testimony.

Respondents assert (States Br. in Opp. 22) that if an agency were not required to submit a detailed log documenting its deliberative materials, the agency would become the "sole arbiter" of whether a document is privileged. But internal agency deliberations are not matters that the APA makes part of the record, yet grudgingly protects from disclosure. Instead, as respondents recognize, the "record" is the underlying, pertinent set of materials that agency officials are "privately deliberating *about*." *Id.* at 23 n.11. Because the subjective motivations or opinions of agency employees are irrelevant to judicial review, pre-decisional deliberative materials are "immaterial as a matter of law." *In re Subpoena Duces Tecum*, 156 F.3d 1279, 1279 (D.C. Cir. 1998). Just as an agency need not log documents it has not considered in its decisionmaking process, so too it need not log other documents legally outside the record.

c. Respondents fare no better in defending the district court's summary and clearly erroneous treatment of the government's invocations of privilege.

Respondents fault (*e.g.*, Indiv. Br. in Opp. 25) the government for not advancing specific arguments about each of the privileged documents ordered disclosed. But that is our point. After affording only two days' notice to prepare a privilege log, the district court ordered the public disclosure of dozens of privileged documents without permitting any briefing or argument. The government's petition here does not simply seek review of the district court's individual privilege errors. Rather, the court's procedures and its resulting errors

are emblematic of its dramatic departure from ordinary principles of judicial review.[4]

Respondents apparently concede that a memorandum from the White House Counsel to the President would be protected by executive privilege, and defend the district court's ruling on the theory that "the author [and] recipient" must not have been readily discernible. Indiv. Br. in Opp. 26. That is wrong, and if the Court wishes to confirm as much, it may call for the district court's *in camera* record. The district court's summary overruling of executive privilege simply underscores its inattention to the substantial separation-of-powers concerns raised here. See *Cheney*, 542 U.S. at 381-382.

Respondents also strain to defend the court's categorical overruling of attorney-client privilege by asserting that "a litigant may not use the attorney-client privilege as both a sword and a shield." States Br. in Opp. 27. But the Acting Secretary has not withheld any materials on which she relied in her decision: The administrative record includes all such materials, including the Attorney General's letter and relevant judicial decisions. If that record were somehow insufficient, the decision may be set aside. But there is no justification for the court's desire to review internal "legal research," Pet. App. 38a, much less for imposing a blanket waiver of privilege.

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[4] Respondents similarly protest (*e.g.*, States Br. in Opp. 29) that the government has not presented with greater particularity its objections to document discovery and depositions. But discovery is altogether out of place in these APA actions, and the government has repeatedly pressed that threshold objection. See Stay Reply 11-13. Individual challenges to particular depositions or document demands are not necessary to preserve that objection.

2. The remaining prerequisites for mandamus are also satisfied.

As explained (Pet. 18), the government has no other adequate means of obtaining relief. Respondents note that legal issues concerning "composition of the administrative record" or "privilege" would not become moot and could still be reviewed on appeal from final judgment (States Br. in Opp. 10). But by that point, separation-of-powers principles will have been further undermined; substantial resources will have been expended to search White House and agency files and review thousands of documents for privilege; numerous senior officials will have been subjected to deposition; and privileged documents will have been irreversibly disclosed, see Stay Appl. 25-31. Mandamus exists in order to confine a district court to its lawful authority *before* final judgment is reached. See Pet. 32-33. As Judge Watford recognized, this is a "classic case [for] mandamus relief." Pet. App. 20a.

Respondents urge (Indiv. Br. in Opp. 35) that they should be given a "fair opportunity to test the legality" of the Acting Secretary's decision. If her exercise of enforcement discretion were ultimately held reviewable, respondents should indeed have that opportunity. But the requested mandamus relief would simply mean that these cases would be litigated under the APA on the record presented by the agency. Respondents have consistently maintained that they are entitled to prevail even without additions to the record or discovery, as their briefing in this Court makes clear. If this Court issues a writ of mandamus, nothing will prevent the district court from addressing respondents' arguments and from resolving the litigation on an appropriately expedited basis.

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For the foregoing reasons and those stated in the petition, this Court should issue a writ of mandamus or, in the alternative, treat this petition as a petition for a writ of certiorari, grant the petition, and reverse the court of appeals' decision.

Respectfully submitted.

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DECEMBER 2017